92-2031

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FLETCHER RAY SIMS,

Petitioner,

v.

STATE OF CALIFORNIA

Respondent.

Petition For Writ Of Certiorari
To The California Court Of Appeal
Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a state court criminal prosecution based on vicarious liability – a theory requiring analysis of the natural and probable consequences of aiding and abetting a particular criminal act – but which prosecution does not require the jury to determine whether the charged offenses are the natural and probable consequences of any specific aided and abetted offense, deny the accused due process of law guaranteed by the Fourteenth Amendment?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings before the California Court of Appeal, Third Appellate District, in action C012631, and their counsel are as follows:

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PETITION FOR WRIT OF CERTIORARI

FLETCHER RAY SIMS, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the California Court of Appeal, entered on December 23, 1992, in action No. C012631. Review was denied by the Supreme Court of California on March 24, 1993, docket S031034.

OPINION BELOW

The opinion of the California Court of Appeal (Appendix A) is not officially reported. The Order Modifying Opinion is reproduced as Appendix B. The Order

of the Supreme Court of California denying review (Appendix C) is not officially reported.

JURISDICTION

The opinion of the California Court of Appeal was filed on December 23, 1992. The opinion was modified by order dated January 7, 1993, with no change in the judgment. A timely petition for review was filed with the Supreme Court of California and review was denied on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

Petitioner was convicted after jury trial in a California superior court of, inter alia, four sexual offenses personally committed by his codefendant, Gregory James Carter against a single female victim. These offenses (Counts V through VIII) were chronologically the last four offenses committed against the victim. Petitioner was sentenced to additional consecutive terms totalling 20 years, based on these four offenses.

The prosecutor sought to assess vicarious criminal liability against petitioner for these acts committed by Carter, based on the legal theory they were natural and probable consequences of petitioner having aided and abetted some earlier criminal act. However, the vicarious liability instruction given to the jury failed to specify any earlier "target offense" or "originally contemplated offense"[1] for the jury to analyze for its natural and probable consequences.

The pertinent portion of the appended opinion by the California Court of Appeal is Section III. (App. 12-14). The opinion sets forth the vicarious liability jury instruction at page App. 12-13. The instruction tells the jury the defendant can be held responsible for the "natural and probable consequences of any criminal act that he knowingly and intentionally aided and abetted." The instruction then asks the jury to determine if all (eight) charged offenses were the natural and probable consequence of "such originally contemplated crime." No "originally contemplated crime" is specified in the instruction. The opinion recognizes the instruction was incorrect when it included kidnapping (Count I) in the list of offenses subject to "natural and probable consequences" analysis. (App. 13-14) The opinion finds the error harmless, however, concluding that the given instruction did not deflect the jury away from the proper target offense analysis and did not turn the jury's task into an analysis of some general "criminal act" or "arrangement" or "situation." (App. 13-14) The opinion also concludes it was readily

---

[1] These terms are used interchangeably in the pertinent California case law.

apparent from the facts the "crime originally contemplated" was kidnapping. (App. 13) Kidnapping was charged in Count I and was chronologically first.

Petitioner disagrees with the analysis of the Court of Appeal and asserts that, a) his jury was never required by the instructions to analyze any single, specific, clearly identified "originally contemplated crime" for its natural and probable consequences; b) the transcript of the prosecutor's argument to the jury shows kidnapping was not the only potential "target offense" or "originally contemplated crime" argued to the jury; c) the entire record definitively shows the case was not presented to the jury based solely on kidnapping as the "originally contemplated crime" and the presentation would not have been so understood by the jury.

Summary of Facts

The Facts summary in the opinion of the Court of Appeal is generally satisfactory as to the description of the offenses themselves. Certain additional facts concerning the presentation and argument to the jury are required to complete the trial presentation picture on which this petition is based.

During discussion between court and counsel, the prosecutor described the vicarious liability issue which the jury was to decide as, "Whether the sexual assaults are a probable and natural consequence of what Mr. Sims entered into with Mr. Carter." (RT 850) The prosecutor asserted this was the issue for the jury to decide. (RT 850)

The prosecutor argued to the jury that petitioner was criminally liable for Carter's acts which were the natural and probable consequences of any criminal act that petitioner knowingly aided and abetted. The argument gave kidnapping as an example of such an act. (RT 897-899) The prosecutor argued to the jury that the female to female oral copulations (Counts V & VI) were the natural and probable consequence of prior sexual conduct, including gang rape, that petitioner had aided and abetted. (RT 899) The prosecutor argued that petitioner did not have to know the particular act that Carter was going to commit. (RT 899) The prosecutor argued that going down to Oakland and sexually assaulting Ronda was a natural and probable consequence of "aiding and abetting." (RT 901)

TIMELY ASSERTION OF FEDERAL QUESTION

The federal due process denial by means of instructional error which removed a material issue from the jury's consideration was timely challenged in the opening brief on appeal, in accordance with California law. (AOB 23-27) The issue was rejected by the California Court of Appeal. (App. 12-14)

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari and reverse the judgment and conviction of three counts of forcible oral copulation and one count of rape (Counts V through VIII) rendered below because the California Court of Appeal has decided a federal constitutional question in a way

which is in conflict with applicable decisions of this Court. (Rule 10.1(c).) The decision below is inconsistent with the decisions in *Boyde* v. *California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *Thompson* v. *Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); *Gregory* v. *Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Vachon* v. *New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974); *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Estelle* v. *McGuire*, ___ U.S. ___, 112 S.Ct. 475, 482, fn. 4, (1991); and *Mills* v. *Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

I. THE JURY INSTRUCTION ON AIDING AND ABETTING VICARIOUS LIABILITY DENIED PETITIONER DUE PROCESS OF LAW BY REMOVING FROM THE JURY'S PROPER CONSIDERATION THE MATERIAL ISSUE OF WHETHER THE FOUR CHALLENGED OFFENSES WERE NATURAL AND PROBABLE CONSEQUENCES OF A SPECIFIC, IDENTIFIED, AIDED AND ABETTED OFFENSE

A. A Short Synopsis Of California Law Allowing Assessment Of Criminal Liability For Natural And Probable Consequences Of An Aided And Abetted Offense

California's vicarious liability rule, as generally described in the given instruction, applies to assess criminal responsibility against the aiding and abetting person who did not personally participate in the consequential offense (offense B) if he directly aided and abetted some

earlier "target" offense (offense A), the natural and probable consequence of which is the commission of offense B. The rule makes the defendant guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. (*People* v. *Croy*, 41 Cal.3d 1, 12, fn. 5, 221 Cal.Rptr. 592, 597 (1985).) The California Supreme Court has interchangeably used the phrase "natural and reasonable consequences" in defining the scope of the vicarious liability rule. (*People* v. *Beeman*, 35 Cal.3d 547, 560, 199 Cal.Rptr. 60, 68 (1984).) An aider and abettor is not liable, however, for independent acts of the other person – i.e., those acts which are not the natural and probable consequence of an attempt to obtain the object of the originally contemplated offense. (*People* v. *Terry*, 2 Cal.3d 362, 402, 85 Cal.Rptr. 409, 435 (1970).) The secondary or consequential offense must be reasonably foreseeable. (*People* v. *Beeman, supra*, 35 Cal.3d at p. 560, 199 Cal.Rptr. at p. 68; *People* v. *Croy, supra*, 41 Cal.3d at p. 12, fn. 5, 221 Cal.Rptr. at p. 597; *People* v. *Godinez*, 2 Cal.App.4th 492, 500-504, 3 Cal.Rptr.2d 325, 330-332 (1992).)

B. The Given Instruction, Its Attributed Case Law Basis, Its Proper Use At Jury Trial, And Its Revised Form

The instruction given at trial is a standard jury instruction (CALJIC No. 3.02) taken from West's California Jury Instructions Criminal, Fifth Edition (1988). The version originally appearing in the Fifth Edition and used in this trial was based on language taken from a number of cases, including *People* v. *Hammond*, 181 Cal.App.3d

463, 468-469, 226 Cal.Rptr. 475, 477-478 (1986), cited in the Comment following the instruction in CALJIC, and *People* v. *Durham*, 70 Cal.2d 171, 181, 74 Cal.Rptr. 262, 268, 449 P.2d 198, 204, (1969), cert. den. 395 U.S. 968, 89 S.Ct. 2116, 23 L.Ed.2d 755.

> Moreover, the aider and abettor in a proper case is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged. Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the jury. (*People* v. *Durham*, *supra*, 70 Cal.2d at p. 181, 74 Cal.Rptr. at p. 268.)

People v. *Hammond*, *supra*, 181 Cal.App.3d at pp. 468-469, 226 Cal.Rptr. at pp. 477-478, held that where the defendant is charged not only with the perpetrator's planned offense but with another offense ultimately committed as a natural and probable consequence thereof, the jury must be instructed on the related responsibility to determine whether the act committed was in fact a natural and probable consequence of the criminal act knowingly and intentionally encouraged. Shortly after that decision, the California Supreme Court decided *People* v. *Rodriguez*, 42 Cal.3d 730, 760, 230 Cal.Rptr. 667, 685, 726 P.2d 113 (1986), quoting with approval from *People* v. *Durham*, and emphasizing – during a discussion as to

whether an alleged "accomplice"[2] who was the principal prosecution witness was an accomplice as a matter of law – that the final determination (was he an aider and abettor and therefore an "accomplice") was for the jury. This rule is thus firmly established in California law.

The CALJIC No. 3.02 (1988) instruction was revised in 1992, after the trial of the present case, to make it more readable and understandable by a jury. The changes were not, however, based on any change in the law.[3] The present version reads as follows:

> CALJIC No. 3.02 (1992 Revision)
>
> PRINCIPALS – LIABILITY FOR NATURAL AND PROBABLE CONSEQUENCES
>
> One who aids and abets [another] in the commission of a crime [or crimes] is not only

---

[2] The term "accomplice" is used in California law to invoke a specific rule requiring the testimony of an "accomplice" to be corroborated. (California Penal Code, § 1111.) Mr. Durham was convicted as an aider and abettor of a murder committed by a Mr. Robinson. (*People* v. *Rodriguez*, *supra*, 42 Cal.3d at p. 760, 230 Cal.Rptr. at p. 685.)

[3] On May 18, 1993, after all state proceedings were complete in the present case, the California Court of Appeal, First Appellate District, Division Three, issued its opinion in *People* v. *Mouton*, ___ Cal.App.4th ___, 93 Daily Journal D.A.R. 6279, 1993 WL 159989 (Cal.App. 1 Dist.). The court reversed the conviction, based on an aiding and abetting theory, holding, in Part I of their opinion, it was prejudicial error to fail to specify and define the target offenses. Just as in the present case, the prosecutor mentioned several possible target offenses and the instruction failed to specify any target offense. The Court of Appeal found a due process violation. The opinion confirms that the 1992 revision of the instruction correctly states the law.

guilty of [that crime][those crimes], but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.

In order to find the defendant guilty of the crime[s] of ___, [as charged in Count[s] ___,] you must be satisfied beyond a reasonable doubt that:

(1) The crime [or crimes] of ___ [was] [were] committed,

(2) The defendant aided and abetted such crime[s],

(3) A co-principal in such crime committed the crime[s] of ___, and

(4) The crime[s] of ___ was a natural and probable consequence of the commission of the crime[s] of ___. (1 California Jury Instructions, Criminal 3.02 [5th ed.], (CALJIC) January 1993 Pocket Part, [1992 Revision].)

Thus, without a change in the law in any respect, the standard instruction has now become much clearer. It requires the trial court to fill in the blank in (1) and the second blank in (4) with a specific target offense, thus avoiding the problem which occurred in the present case where no target offense was specified. The trial court is now reminded by the blank spaces of the necessity to specify a "target offense" or "originally contemplated offense" for the jury to analyze for its natural and probable consequences. In the present case, if the clearer form of instruction had been used, the prosecutor could have elected kidnapping as the offense to insert in these two blanks but then his argument about offenses flowing

from gang rape would probably not have been made and his general assertions about the challenged offense being consequences of "any criminal act" or "prior sexual conduct" or "aiding and abetting" (without specifying any offense at all) would also likely not have been made because the attention of all counsel, as well as that of the court, would have been focused on the proper specification of a target offense for the jury to analyze. Or, if the prosecutor had specifically elected gang rape as his choice for the target offense, the jury would have had their task pinpointed on analyzing that offense for its natural and probable consequences. The modified standard instruction self-focuses court and counsel on the proper "offense 'A' results naturally and probably in offense 'B' " type of analysis. It also makes the required analysis clear for the jury.

C. The Due Process Violation

1. In General

As described above, in an aiding and abetting vicarious liability case, California law requires the fact-finder to determine if allegedly consequential offense "B" was the natural and probable result of offense "A". Simple common sense logic compels the conclusion that this determination is impossible if offense A is not clearly specified. One cannot definitively analyze the consequences of the indefinite. On appeal, the California Court of Appeal focused on Count I (kidnapping) as being the target offense. That might have been a logical choice for the prosecutor to have made at trial but he also made other choices during his argument to the jury. As the

more completely described record shows, the presentation to the jury was not definitive, contrary to the conclusion stated by the Court of Appeal. The jury was never presented, for example, with the clear task of deciding if compelled female to female oral copulation is a natural and probable consequence of kidnapping.

The failure to have the jury decide this issue was a denial of due process of law guaranteed by the Fourteenth Amendment because of this Court's insistence, in the cases cited in the next paragraph, that each element of a crime be proven to the fact-finder and found true by that fact-finder beyond a reasonable doubt. And the inclusion of kidnapping as a consequential offense, combined with the lack of specification of some allegedly aided and abetted offense, other than the eight offenses charged, did not assign the jury the specific task of analyzing this other unnamed offense. The additional mention of rape by the prosecutor as a possible target offense further introduced another potential consequential offense analysis without requiring the jury to actually engage in it under the well established rules of California aiding and abetting law.

This Court's jurisprudence has repeatedly stated that the Fourteenth Amendment Due Process Clause requires proof beyond a reasonable doubt of each element of a crime. (*Thompson* v. *Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960); *Gregory* v. *Chicago*, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969); *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Vachon* v. *New Hampshire*, 414 U.S. 478, 94 S.Ct. 664, 38 L.Ed.2d 666 (1974); *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781,

2789, 61 L.Ed.2d 560 (1979).) Every material factual matter must be decided by the fact-finder under proper instructions. (*Sandstrom* v. *Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).)

Petitioner submits that the instruction here removed a material part of the required natural and probable consequences analysis from the jury's consideration. The jury did not have to make the specific, "Does target offense 'A' naturally and probably result in consequential offense 'B'?" determination. Thus, there was a specific violation of the Fourteenth Amendment Due Process Clause guarantee that such constitutionally relevant matters be presented to, considered and decided by the jury.

As discussed above, under California law, in order for criminal liability to be assessed against petitioner for Carter's acts, the natural and probable consequences link must be established. The natural and probable consequences link between a specified target offense and the four charges involved here is thus an element of each of these charges. Without a proper link, only Carter may be prosecuted for what Carter did. It is thus a proper and essential part of the jury's task, under clear precedent from this Court, to analyze the target offense and decide if this link is present. That analysis was not done here. In the language of *Boyde* v. *California*, *infra*, there is a reasonable likelihood that the jurors here would have interpreted the instructions to not require that they specifically find each of Counts V through VIII to have been the natural and probable consequences of a specifically identified target offense.

2. The Proper Standard For Evaluating The Constitutionality Of An Ambiguous Instruction

When an instruction is ambiguous and therefore subject to erroneous interpretation by the jury, the appropriate test to be applied to determine the instruction's constitutionality under the Fourteenth Amendment is whether there is a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde* v. *California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990) – a capital sentencing proceeding, as to which the Eighth Amendment, acting through the Fourteenth Amendment Due Process Clause, requires the consideration of certain types of evidence.) This standard was reaffirmed and applied in *Estelle* v. *McGuire*, ___ U.S. ___, 112 S.Ct. 475, 482, fn. 4, (1991) – a non-capital second degree murder prosecution. Petitioner does not challenge this standard and submits that, when applied to the facts of the present case, this standard compels a reversal of the judgment as to Counts V through VIII, because the Fourteenth Amendment also requires a jury to perform a task which it did not perform here – consideration of and decision on an element of each of the specified offenses. The Fourteenth Amendment makes the omitted task and the evidence to be considered during the performance of that task constitutionally relevant.

3. Prior Decisions Involving Ambiguous Or Confusing Instructions

This Court has previously addressed similar problems with instructions that arguably could be

misunderstood and therefore misapplied. When the challenged instruction does not specifically stop or prevent the proper consideration, by actually barring it or by directing the jury's attention to a different analysis, this Court has declined to find any improper interference with the introduction, use or evaluation of otherwise constitutionally relevant evidence. (*Franklin* v. *Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 2320 (1988) – mitigating evidence admitted and allowed to be considered, complying fully with Texas law.) Mr. Franklin desired special instructions which would have told the jury to consider "residual doubt," an issue of purportedly federal constitutional origin, but not an element of a Texas crime or an issue required by Texas law to be considered and decided as a condition precedent to making a particular finding. (*Id.*, 487 U.S. at pp. 172-176.) Mr. Franklin also asserted that the instructions given did not provide an opportunity for the jury to give independent mitigating weight to his exemplary record while in prison. (*Id.*, at pp. 177-180.) The present case is distinguishable in that the analysis of a specific target offense to determine its natural and probable consequences is required by California law as a condition precedent to imposing aiding and abetting vicarious criminal liability on one person for criminal acts personally committed by another. Texas law did not require a jury to consider and reject "residual doubt" before imposing a death sentence. Texas law did not require the jury to make an "independent" weighing of an exemplary prison record. The Texas jury also had free reign to consider the exemplary prison record in mitigation and presumably did so. The Texas jury was fully instructed on what to consider under Texas

law and presumably considered everything. In short, the Texas instruction(s) did not interfere with the jury's consideration of constitutionally relevant evidence; the present California instruction did. This conclusion is resoundingly reinforced by the very recent decision of the California Court of Appeal, First Appellate District, Division Three in *People* v. *Mouton, supra*, ___ Cal.App.4th ___, 93 Daily Journal D.A.R. 6279, 1993 WL 159989 (Cal.App. 1 Dist.).

In *California* v. *Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987), this Court, disagreeing with the California Supreme Court, concluded a reasonable jury would likely have interpreted the challenged instruction as telling them only that "mere sympathy" without more should not be a deciding factor, while allowing the jury to consider sympathy. This was a carefully reasoned linguistic analysis of an instruction, which, although it could perhaps have been more clearly worded as to the placement of modifiers, did not specifically fail to mention some analysis required by California law. In consonance with the *Boyde* v. *California* standard, this Court came to a conclusion as to what the jurors would reasonably have interpreted the instruction to mean. In contrast, the presently challenged instruction utterly failed to mention a specific analysis which California law requires. The present petition deals not with a linguistic analysis of words contained in the instruction, but with what is totally missing from the challenged instruction the designation of a target offense.

In *Mills* v. *Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), another close call case requiring analysis of how a reasonable jury would reasonably have

interpreted a confusingly worded instruction (later amended to remove the confusing language), this Court felt there was a "substantial probability"[4] that jurors thought they were precluded from considering any mitigating evidence unless they unanimously agreed on the existence of a particular mitigating circumstance. The mitigating evidence that was improperly required to be discarded from consideration there was evidence (any kind of mitigating evidence, regardless of jury unanimity on each factor) which this Court has repeatedly stated must be considered by a capital sentencing jury. Although the context is different, the present case's instruction told the jury to consider the natural and probable consequences of any act petitioner aided and abetted and did not tell the jury to analyze any specific target offense, thus directing the jury away from the constitutionally required analysis and causing a similar type of constitutional error.

4. Reasonable Likelihood That A Jury Would Be Prevented From Considering Constitutionally Relevant Evidence

The *Mills* jury had no opportunity to indicate anything other than "No." The Sims jury had no opportunity to say that only some of them had decided Counts V through VIII naturally and probably resulted from aiding and abetting a kidnapping, or that some of them had decided Counts V through VIII naturally and probably

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[4] This standard is essentially consonant with the *Boyde* standard of "reasonable likelihood."

resulted from aiding and abetting rape, some of them had decided Counts V through VII naturally and probably resulted from aiding and abetting some other offense, and/or some of them had never considered the matter in detail as to any particular target offense because no target offense was specified in the instruction and no instruction ever outlined the required precise analysis. There was no vehicle in the present case for a juror to express the view that lesbian sex was not a natural and probable consequence of a kidnapping or of a rape, if common sense and logic would have told that juror that such bizarre and rare activity was not reasonably foreseeable. The instruction would reasonably stifle the expression of such views.

A reasonable jury selected from lay persons, and being presented with the instructions and argument contained in the present case, would have no way of knowing the requirement of California law that the consequential vicarious liability offense must be a natural and probable consequence of a specific aided and abetted offense. None of the instructions spell this out. The probability that they would engage in the required analytical process under the instructions given here, taken individually or as a whole, is zero.

Although Count I (kidnapping) is not specifically challenged here, the inclusion of that count in the instruction as a potential consequential offense adds additional force to the arguments stated above concerning ambiguity. The instruction is concededly erroneous because of this inclusion. If that offense could be a "consequential offense," as the instruction states, this indicates to the jury that some other unnamed offense could be the target

offense. That is reinforced by the "any criminal act" language which appears in the instruction and is not followed by any designation of a particular target offense. It is also bolstered by the portions of the prosecutor's arguments which refer generally to "aiding and abetting" without naming any target offense. And it fits quite well with the prosecutor's position stated to the court earlier – clearly erroneous – that aiding and abetting liability could be assessed against Mr. Sims for offenses that were the "probable and natural consequence of what Mr. Sims entered into with Mr. Carter." No such other target offense was specified or defined.

If a jury were presented with clear guidelines for analyzing petitioner's vicarious responsibility for Carter's acts, there is a very substantial probability that responsibility for some or all of the four challenged offenses would be assessed only against Mr. Carter. How common is it for a kidnapping to result in compelled oral copulation of another woman? This is a statistically rare event. It is highly unlikely to happen. That is the exact opposite of the California law requirement that the allegedly consequential offense be natural and probable. How reasonable is it to expect that Carter will commit a rape while Sims is asleep? Again, this is an unlikely event. Does kidnapping naturally and probably result in forced oral copulation? Perhaps it does and perhaps it does not, but this is a matter for the jury to decide under proper instructions. In a properly tried case, each of these four charges would logically be subjected to a substantial discussion by the jury as to whether each is a natural and probable consequence of whatever offense is specified as the target offense.

The California courts have recognized that not all succeeding offenses are reasonably foreseeable. Some consequences are not reasonable, natural and expected as a matter of law. *People* v. *Godinez, supra,* 2 Cal.App.4th at pp. 500-504, 3 Cal.Rptr.2d at pp. 330-332, wherein Mr. Godinez was prosecuted for a stabbing probably done by another person, held that homicide is not always a reasonable and natural consequence to be expected in a gang attack and thus an instruction to that effect was wrong. This is a clear-cut recognition of the fact that juries can easily find the required link to be missing. It also reemphasizes that the decision is for the jury.

D. Summary

When the State of California charges the defendant with offenses personally committed by another person, and claims the defendant's criminal liability is based on his having aided and abetted some other offense, California law requires the jury to determine if the allegedly consequential offenses are a natural and probable consequence of the originally contemplated offense. This is an element of each charged and allegedly consequential offense. The Fourteenth Amendment guarantees every accused person the right to have such elements of charged offenses decided by the jury. The failure to have the jury perform that function here under proper instructions denied petitioner due process of law, as guaranteed by the Fourteenth Amendment. Petitioner therefore respectfully requests this Court to vacate the judgment below as to Counts V through VIII and to reverse and remand the matter to the California Court of Appeal.

CONCLUSION

The challenged instruction removed from the jury's consideration a precise analysis of natural and probable consequences which is required by California law. This denied petitioner due process of law in violation of the Fourteenth Amendment.

Petitioner respectfully requests this court to issue a writ of certiorari to review the judgment of the California Court of Appeal, Third Appellate District, and requests this Court to vacate the judgment below and to reverse the judgment as to Counts V through VIII.

Respectfully submitted,

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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. FLETCHER RAY SIMS, Defendant and Appellant.	)	C012631 (Super. Ct. No. CR104600) (Filed Dec. 23, 1992)

The jury found defendant guilty of kidnapping Ronda H. (count I; Pen. Code, § 207, subd. (a); further section references are to the Penal Code) and twice raping her in concert with codefendant Gregory James Carter (counts IV and VIII; § 264.1). Defendant also was convicted of five counts of forcible oral copulation in concert with Carter (counts II, III, V, VI and VII; § 288a, subd. (d)). The jury found defendant used a deadly weapon (a knife) in the commission of counts II through VII (§ 12022.3, subd. (a)), and was armed with a deadly weapon in the commission of count VIII (§ 12022.3, subd. (b)). He admitted having suffered a prior serious felony conviction (§ 667, subd. (a)) and having served a prior separate prison term (§ 667.5, subd. (b)).

Sentenced to 80 years in state prison, defendant appeals contending that certain counts and weapons enhancements are not supported by substantial evidence,

the trial court committed prejudicial instructional error, the court violated section 654 in sentencing, and the weapons enhancements must be stricken because defendant was not personally armed with, and did not personally use, a deadly weapon in the commission of the offenses.

We conclude the weapon enhancements must be stricken pursuant to People v. Reed (1982) 135 Cal.App.3d 149. In all other respects, we shall affirm the judgment.

FACTS

On the evening of February 18, 1991, defendant and Carter approached 16-year-old Ronda H. in a Lucky's grocery store parking lot on Stockton Boulevard in Sacramento County. Carter asked Ronda if she could drive them to Oak Park. She told him no, that she was going home. After glancing at defendant, Ronda saw Carter was holding a knife. Carter then grabbed Ronda's car keys out of her hand and forced her into the back seat of her car. With defendant in the front passenger seat, Carter drove Ronda to the apartment of his girlfriend, Tina Johnson, with whom Carter resided (count I).

Carter made Ronda sit at the kitchen table and forced her to inhale some smoke from a white rock which was burning in a baby food jar. He then took Ronda by the arm and led her upstairs to what appeared to be a child's bedroom. Defendant came up after a few minutes.

Carter placed Ronda on a mattress and removed a knife with a five- or six-inch blade from one of his socks. He pointed the knife at her and twice commanded Ronda

to take off her blouse. She complied because she "didn't want to die." He then told her to take off her shorts, which she did. Ronda told Carter she was on her period because she thought it would dissuade him. Defendant said "he wanted proof" and told her to take her tampon out. She did so.

Holding his knife in his hand, Carter forced Ronda to orally copulate his penis (count II). After a few minutes, he told her to "Stop now" and to "do [his] friend." Ronda refused. Carter pointed the knife at her and repeated, "Do my friend." Defendant stood in front of Ronda while she orally copulated him (count III). Carter left the room.

After a couple of minutes, defendant pushed Ronda back on the mattress and raped her (count IV). Ronda did not resist because she knew Carter was still in the house and thought he would reenter the bedroom.

Defendant got dressed. Carter reentered the room and told defendant to retrieve the baby food jar. Defendant did so, and then Johnson entered the room. Carter told Ronda to take a hit from the jar, which she did. He then told her to perform oral copulation on Johnson. Ronda said, "No, no. I don't want to do that," but Carter made her do so (count V).

Carter took Ronda and Johnson across the hall to another room. He told Johnson to take her pants down, and then forced Ronda to copulate her again (count VI). After a minute, Carter told Ronda and Johnson to go back to the child's bedroom.

When they returned to that bedroom, Carter had Ronda orally copulate him again (count VII). Defendant

and Johnson were present in the room. Carter next demanded that Ronda fondle his scrotum while Johnson orally copulated him. At some point, Carter made Ronda suck on his scrotum. He told Ronda she "owed him" for "smoking his dope." Eventually, defendant left the room. After a couple of minutes, Carter told Johnson and Ronda to switch positions. Ronda orally copulated Carter while Johnson fondled his scrotum. Later, Johnson said, "That's enough," and went downstairs while Carter continued to fondle Ronda.

Defendant returned to the bedroom and talked to Carter about leaving to "go make some money." Ronda asked if she could leave. Carter told her they would take her to a motel on 16th Street where he would return her car keys. He told Ronda to get dressed. She put on her shirt and shorts but did not bother to search for her underwear.

Carter, defendant and Ronda left the apartment. As they were leaving, Carter said to Johnson, "Thanks for your hospitality." Carter, defendant and Ronda got back into Ronda's car. Carter drove slowly past a motel on 16th Street but did not stop. Instead, he drove all around Sacramento.

After getting something to drink at a Circle K market, Carter drove to San Francisco and stopped "where all the topless places are." He took Ronda out of the car and continued to hold her hand. Several black men were standing nearby. Ronda saw several police cars pass by but did not try to escape because she feared that Carter and defendant would catch her and kill her. After 15 to 20 minutes, Carter put Ronda back in the car and they drove

toward Oakland. At one point, Carter stopped the car and told Ronda he "would rather kill [her] and do life in prison than have some little bitch snitch him off."

Carter then drove to his father's house in Oakland. He left the car and went to the door of the house. A few minutes later, he returned to the car and said, "Okay, come inside." Defendant sat on a couch near the front window and fell asleep. Carter told Ronda to sit near defendant. Later, he had her go to the bathroom and wash her clothes.

Carter brought Ronda a shirt and a pair of men's underwear. He gave her a blanket and told her to sit on the couch. Carter's father, who had been present, went to bed. Carter then went to the couch and told Ronda to unbutton her blouse. She complied. Carter raped her (count VIII), and then lay down on the floor.

The next morning, Carter told Ronda they were leaving. He held her arm and walked her to the back seat of her car. Carter drove to a McDonald's on San Pablo Drive and went inside while defendant and Ronda waited in the car. When Carter returned he gave defendant a hamburger and offered one to Ronda, who declined. Defendant ate his hamburger while Carter went back inside the restaurant for something to drink. When Carter was gone, Ronda escaped through her car's broken rear window and obtained refuge at a nearby business.

DISCUSSION

I

Defendant contends the evidence presented at trial was insufficient in several respects. Our standard of review is well established. "To determine sufficiency of the evidence, one examines whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process one must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and one must resolve the question of sufficiency in light of the record as a whole." (People v. Hernandez (1988) 47 Cal.3d 315, 345-346; see People v. Johnson (1980) 26 Cal.3d 557, 578; Jackson v. Virginia (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].)

Defendant claims his count IV rape in concert conviction is not supported by substantial evidence that he acted in concert with Carter. Noting that Carter left the bedroom and went downstairs while defendant was committing the count III oral copulation and did not return until after the count IV rape was completed and defendant was dressed, defendant claims his rape was not done in concert because "Carter was not there while the rape was occurring. [Carter] said nothing about [defendant] raping [Ronda]. 'Do my friend' mean[t] to perform oral copulation. It [did] not refer to rape. Carter may have facilitated and encouraged oral copulation, but not rape." We are unpersuaded.

Although Carter was not physically standing in the room while defendant raped Ronda, Carter was in the apartment and his presence was an important factor in overcoming Ronda's resistance to defendant's attack. Defendant's sexual assault on the victim commenced when Carter forced Ronda to orally copulate defendant. The rape soon followed. Ronda testified that, although she knew Carter took the knife with him when he went downstairs, she did not fight defendant during the rape because she "was scared [she] was going to die." She was "still concerned about the knife" because she "knew that . . . [Carter] was going to come back up. [She] knew he was still in the house."

People v. Jones (1989) 212 Cal.App.3d 966 is instructive. In *Jones*, two men entered the victim's home wearing ski masks over their heads. The appellant ordered the victim to remove her panties and she complied. He then raped the victim while the second man "stood forebodingly at the door, sealing off all possible escape." (*Id.*, at pp. 968-970.) The court concluded there was substantial evidence of rape in concert because "the second man's presence contributed toward terrorizing the victim and overcoming her resistance, thereby facilitating [the appellant]'s rape." (*Id.*, at p. 970.)

Ronda's testimony establishes that Carter performed a function similar to that performed by the second man in *Jones*. At knife point, Carter forced the victim to engage in sexual conduct with defendant. He was present when she unwillingly performed oral copulation on defendant. The fact he left the room before defendant proceeded to rape the victim is of no moment. (People v. Lopez (1981) 116 Cal.App.3d 882, 886-887 [there is no requirement that one

either participate in or be personally present during the act for the purposes of acting in concert].) That Carter's acts of assistance may not have been as extensive as those in People v. Wheeler (1977) 71 Cal.App.3d 902, 906-907, relied on by defendant, also does not undermine the jury's finding.

II

Defendant contends his convictions on counts V through VIII are not supported by substantial evidence because there was insufficient evidence he aided and abetted the commission of these counts and the evidence did not support a finding that these counts were the "natural and probable consequences" of other criminal offenses defendant aided and abetted. Neither claim has merit.

An aider and abetter must act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense. (People v. Beeman (1984) 35 Cal.3d 547, 560.) To be an aider and abettor, one must render " 'some independent contribution to the commission of the crime or otherwise make[] it more probable that the crime will be successfully completed than would be the case absent such participation.' " (People v. Flores (1969) 269 Cal.App.2d 666, 669, quoting People v. Belenger (1963) 222 Cal.App.2d 159, 163.)

Defendant contends he did not aid or abet counts V and VI (the forcible oral copulations of Tina Johnson) because he "left as the action turned to the female to

female oral sex. He said nothing to encourage such acts and just as importantly he did nothing."

Defendant overlooks his role in the abduction of Ronda, without which none of the succeeding crimes could have occurred. Defendant was present when Ronda was seized from the parking lot, he stayed with her in the car while Carter entered a residence to purchase drugs, and he escorted her to Johnson's apartment. Defendant also ignores his harassment of Ronda by demanding "proof" that she was on her period. In addition, he overlooks the fact Ronda was forced to orally copulate him and the fact he raped her thereafter, all of which took place prior to forcible oral copulation of Johnson. Reasonable jurors could conclude that defendant's series of demeaning activities diminished Ronda's ability to resist succeeding offenses and made it more probable that counts V and VI would be completed. (*Flores, supra,* 269 Cal.App.2d at p. 669.)

Moreover, defendant's claim he left at the inception of the counts involving Johnson is factually incorrect. Ronda testified that, after defendant went downstairs to get the jar from which Ronda was forced to inhale the smoke of a burning white rock, defendant came back upstairs with Johnson. Carter then ordered Ronda to commit count V in defendant's presence. Carter took Johnson and Ronda across the hall for count VI, while defendant remained in the child's bedroom. Defendant did not leave the apartment until after counts V and VI were completed. Reasonable jurors could infer that defendant's presence during counts V and VI assisted their commission.

Defendant makes a similar contention as to counts VII (forcible oral copulation of Carter) and VIII (rape by Carter). Again, defendant overlooks his role in Ronda's abduction, without which neither offense could have occurred. Defendant also ignores his activities which terrorized Ronda and, inferentially, helped to overcome her will to resist the subsequent assaults. Reasonable jurors could infer that defendant's acts materially assisted the commission of the later crimes. (*Flores, supra,* 269 Cal.App.2d at p. 669.)

In addition, contrary to defendant's claim, the evidence supports a finding that he was criminally responsible for counts V through VIII because the acts were reasonably foreseeable consequences of Ronda's abduction, which the evidence suggests was for the purpose of having sex with the victim. The jury was instructed with CALJIC No. 3.02 (1989 Revision) as follows: "One who aids and abets is not only guilty of the particular crime that to [his] knowledge [his] confederates are contemplating committing, but [he] is also liable for the natural and probable consequences of any criminal act that [he] knowingly and intentionally aided and abetted."

Whether a crime is the natural and probable consequence of the offense originally contemplated and aided and abetted by the defendant necessarily depends on the facts of a given case. The trier of fact must consider the circumstances surrounding the conduct of both the perpetrator and the aider and abettor. (People v. Brigham (1989) 216 Cal.App.3d 1039, 1051, 1054-1056.) The factual determination whether a crime committed by the perpetrator was a natural and probable consequence of the criminal act originally contemplated, aided and abetted is

not founded on the aider and abettor's subjective view of what might occur. Rather, liability is based on an "objective analysis of causation;" i.e., whether a reasonable person under like circumstances would recognize that the crime was a natural and probable consequence of the act aided and abetted. (*Id.*, at p. 1051.)

Defendant contends counts V and VI were not reasonably foreseeable consequences of Ronda's abduction because "[t]here was never any discussion about having others perform sex acts for the enjoyment of Carter or [defendant]."[1] The point fails because, despite the absence of such discussion, reasonable persons under like circumstances could believe that such acts were natural and probable consequences of Ronda's abduction for sexual purposes.

Defendant disagrees, arguing with respect to counts V and VI that "[l]esbian sex is not a reasonably foreseeable outgrowth of heterosexual sex." However, defendant ignores the fact that, having abducting Ronda for apparent sexual purposes, he and Carter took the victim to the residence of Tina Johnson, Carter's girlfriend, with whom Carter resided. Because defendant and Carter chose the apartment of Carter's girlfriend as the site for their sexual assaults on the victim, the jury could conclude that it

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[1] Defendant relies on People v. Garewal (1985) 173 Cal.App.3d 285, which holds that aider and abettor liability does not extend to acts that are "actually forbidden as part of the original agreement." (*Id.*, at pp. 299-300.) Defendant's reliance on *Garewal* is misplaced because nothing in the record suggests that any acts were "actually forbidden."

was reasonably foreseeable the girlfriend would take part in the sexual acts.

With respect to count VIII, defendant argues: "[O]nce it was known that [Ronda] was on her period, and that Carter had shunned intercourse because of that, it was not reasonably foreseeable that Carter would engage in intercourse with [the victim]. The rape in Oakland was thus not reasonably foreseeable." (AOB 37-38) Defendant is wrong. Nothing in the record supports defendant's assumption that Carter shunned or purposefully avoided intercourse with Ronda. Moreover, it is apparent that Carter and defendant were intent on sharing the victim for sexual pleasure. When defendant forcibly had sexual intercourse with the victim despite the fact she was on her period, it was reasonably foreseeable that Carter would emulate defendant's conduct. Counts V through VIII are supported by substantial evidence. (*Hernandez, supra,* 47 Cal.3d at pp. 345-346.)

III

The trial court instructed the jury with a modified version of CALJIC No. 3.02 (1989 Revision) as follows:

> "One who aids and abets is not only guilty of the particular crime that to [his] knowledge [his] confederates are contemplating committing, but [he] is also liable for the natural and probable consequences of any criminal act that [he] knowingly and intentionally aided and abetted. You must determine whether the defendant is guilty of the crime originally contemplated, and, if so, whether the crimes charged in counts [I]

> through [VIII] were a natural and probable consequence of such originally contemplated crime."

Defendant contends this instruction was erroneous because it did not identify the "crime originally contemplated," yet it asked the jury to decide whether counts I through VIII were "natural and probable consequences" of that unidentified crime. According to defendant, "[t]his invited the jury to improperly widen the scope of the target offense concept to 'any criminal act' [the jurors] might envision as having been committed in a general sense."

The court did not commit prejudicial error in failing to identify the "crime originally contemplated" because that was readily apparent from the facts. The crime originally contemplated was the first criminal act committed by defendant and Carter, the kidnapping of the victim. This was stressed repeatedly by the prosecutor in summation. In discussing the natural and probable consequences doctrine of aider and abettor liability, the prosecutor pointed out several times that the crime originally contemplated and committed was the kidnapping of Ronda H. "for the purpose of sexually assaulting her." The prosecutor then argued: "What is [*sic*] the natural and probable consequences of kidnapping this young female, taking her to an isolated location, and taking her up into an isolated bedroom? [¶] You don't have to be a mindreader or mystic, or have a crystal ball to know what the natural and probable consequences are. [¶] [The victim] knew it. She knew when she was taken up those stairs that she was going to be sexually assaulted. And you know it. And [defendant] knew it, and Gregory

Carter knew it." The prosecutor urged the jury to find that all the sex acts committed thereafter were natural and probable consequences of the kidnapping for sexual purposes.

The instruction was incorrect insofar as it directed the jury to determine whether count I (the kidnapping) was the natural and probable consequence of the kidnapping. However, the error was harmless because, under the facts of this case, the instruction did not, as defendant claims, "deflect[] the jury away from the proper target offense analysis and turn[] the jury's task into an analysis of some general 'criminal act' or 'arrangement' or 'situation.' "

IV

The court instructed the jury in the language of CALJIC No. 3.18 as follows: "The testimony of an accomplice ought to be viewed with distrust. This does not mean that you may arbitrarily disregard such testimony, but you should give to it the weight to which you find it to be entitled after examining it with care and caution and in the light of all the evidence in the case." The court also gave the following version of CALJIC No. 3.19: "You must determine whether the witness Tina Johnson was an accomplice as I have defined that term. [¶] The defendant has the burden of proving by a preponderance of the evidence that Tina Johnson was an accomplice in the crime[s] charged against the defendant."

Defendant contends the trial court erred in failing to limit CALJIC No. 3.18 to prosecution witnesses and incriminating testimony.

First, he argues that CALJIC No. 3.18 erroneously told the jury to view codefendant Carter's testimony with distrust. According to defendant, "Carter's testimony was primarily exculpatory. He said [Ronda] consented. That was the key to the whole case. Her questionable attire lent some credence to that version of the events but the jury was told to discount Carter's testimony when considering [defendant's] case." We are not persuaded.

It would have been error to instruct the jury to view Carter's testimony with distrust. "Where a codefendant accomplice takes the stand, confesses his guilt, and incriminates his codefendant, then the cautionary instruction must be given. [Citation.] But, where a codefendant testifies in his own behalf [without conceding his own guilt] . . . it is highly prejudicial to the testifying codefendant to give a cautionary instruction, for the jury is then being instructed that the law requires his defensive testimony, and his defense, to be viewed with distrust. [Citations.]" (People v. Fowler (1987) 196 Cal.App.3d 79, 87.) Where, as here, the testimony exculpates both defendants, a cautionary instruction would be prejudicial to both of them.

In this case, the prosecutor's argument identified *Tina Johnson* as the only potential accomplice, and the trial court limited CALJIC No. 3.18 by instructing immediately thereafter with CALJIC No. 3.19, which (1) told the jury to determine whether *Tina Johnson* was an accomplice, and (2) stated that defendants had the burden of proof on that issue. Read together, CALJIC Nos. 3.18 and 3.19 plainly referred to Johnson and not to Carter. (Cf. People v. Burgener (1986) 41 Cal.3d 505, 538-539 [the correctness of jury instructions is to be determined from

the entire charge of the court].) Reasonable jurors would not have read the instructions as applying to Carter's testimony. (See People v. Cortez (1981) 115 Cal.App.3d 395, 406 [use of CALJIC Nos. 3.18 and 3.19 together sufficed to limit their effect to prosecution witnesses].) If defendant believed that further instruction on the point was desirable, he could have so requested. We conclude from his failure to do so that he believed the instructions were adequate. (*Id.*, at p. 407.)

As to Johnson's testimony, defendant contends it was error to give CALJIC Nos. 3.18 and 3.19 because "much of her testimony was exculpatory." We disagree.

When an accomplice is called as a witness by the prosecution, the court must instruct sua sponte with CALJIC No. 3.18, informing the jury that an accomplice's testimony should be viewed with distrust. (People v. Williams (1988) 45 Cal.3d 1268, 1314; People v. Terry (1970) 2 Cal.3d 362, 399.) However, when an accomplice is called as a witness by the defendant, the instruction should not be given unless requested by the defendant. (*Ibid.*; People v. Miller (1960) 185 Cal.App.2d 59, 82.) If both parties call an accomplice, the instruction must be restricted to prosecution witnesses only. (*Williams, supra,* 45 Cal.3d at p. 1314; *Cortez, supra,* 115 Cal.App.3d at p. 406.)

Here, Johnson was called as a prosecution witness due to her inculpatory pretrial statements regarding Carter forcing Ronda to engage in acts of oral copulation with Johnson. From other evidence at trial, the jury could

have found Johnson was an accomplice and had incriminated Carter (and inferentially, defendant) to protect herself. Hence, the court was required to give the accomplice instructions in question for the protection of Carter and defendant. (*Williams, supra,* 45 Cal.3d at p. 1314; *Miller, Supra,* 185 Cal.App.2d at pp. 82, 84.) If defendant believed his interests would be better served by the omission of the instructions, he was required to request that they be deleted to avoid waiver of the perceived error on appeal. (*Cortez, supra,* 115 Cal.App.3d at p. 407, *Miller, supra,* 185 Cal.App.2d at p. 84.) He did not do so.

"[C]ontrary to the general rule that a jury instruction may be challenged on appeal even though no objection was raised at trial, an objection to a cautionary instruction has been required before the defendant may assert error on appeal because a defendant 'may not sit silently during the course of his trial; create a situation which may be to his advantage or disadvantage and require the court to make an election on his behalf without being bound by that election.' " (People v. Toro (1989) 47 Cal.3d 966, 975, citations omitted.)

V

Defendant contends (AOB 85-86) the trial court erroneously instructed the jury with CALJIC No. 2.11.5 (1989 Revision) as follows:

> "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There may be many reasons why such person is not here on trial.

> Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of the defendant[s] on trial."

The "involved person" was Tina Johnson, who was called as a prosecution witness. As the use note to CALJIC No. 2.11.5 states, the instruction should not be given if the other person is a witness for either the prosecution or the defense. (Use note to CALJIC No. 2.11.5 (5th ed. 1988, bound vol.); People v. Marks (1988) 45 Cal.3d 1335, 1346-1347.)

Defendant argues he was prejudiced because the instruction was likely to mislead the jurors into giving undue weight to Johnson's extrajudicial statements which incriminated defendant. Specifically, defendant contends the instruction may have dissuaded the jury from considering that Johnson was not prosecuted because, in her statements, she had told the police "what they wanted to hear." We are not persuaded.

"In determining whether an instruction interferes with the jury's consideration of evidence presented at trial, we must determine 'what a reasonable juror could have understood the charge as meaning.' While the initial focus is on the specific instruction challenged, we must also review the instructions as a whole to see if the entire charge delivered a correct interpretation of law." (People v. Garrison (1989) 47 Cal.3d 746, 780, citations omitted; accord People v. Price (1991) 1 Cal.4th 324, 446.)

Here, the trial court cautioned the jury not to single out any instructions (CALJIC No. 1.01) and to consider

the full range of factors affecting credibility (CALJIC No. 2.20). Having heard CALJIC No. 2.11.5, a reasonable juror would continue to act in accordance with the court's instructions on accomplice testimony (i.e., to view Johnson's extrajudicial statements with distrust), and would refrain from discussing or giving any consideration to the separate issue of why Johnson was not being prosecuted. (People v. Cox (1991) 53 Cal.3d 618, 667; *Garrison, supra,* 47 Cal.3d at p. 780; *Williams, supra,* 45 Cal.3d at p. 1313.) There is no reason to believe the instruction would cause the jury to give undue weight to Johnson's extrajudicial statement.

VI

Defendant claims the trial court had a duty to instruct sua sponte that a defendant who entertains both a reasonable and bona fide belief that the victim voluntarily consents to engage in the sexual offense does not have the wrongful intent necessary for conviction of the crime. (CALJIC No. 10.65; People v. Mayberry (1975) 15 Cal.3d 143, 153-158.)

In support of this contention, defendant cites familiar law that instructions must be given sua sponte on a particular defense if it appears the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case. (People v. Sedeno (1974) 10 Cal.3d 703, 716, disapproved on other grounds in People v. Flannel (1979) 25 Cal.3d 668, 684-685, fn. 12; People v. Wickersham (1982) 32 Cal.3d. 307, 326.) Defendant claims he "relied on [the defense of

good faith belief in consent], there was pervasive evidence supporting such a defense, and it was not in any manner inconsistent with [his] theory of the case." He is wrong.

It did not appear that defendant relied on a defense of *mistaken belief* of consent. He rested without presenting any defense, and his closing argument did not address the issue of mistaken belief of consent. The trial court is not clairvoyant; it could not have known defendant was "relying" on an unarticulated defense.

However, defendant claims there was substantial evidence of mistaken belief of consent because "Carter testified to consent" and "Tina Johnson testified to consent." Defendant reasons that, because the evidence suggested a defense of *actual* consent, it necessarily also suggested a defense based upon his reasonable belief of consent. We disagree.

"The consent defense differs from the reasonable belief in consent defense. [Citation.] 'Where the defendant claims that the victim consented, the jury must weigh the evidence and decide which of the two witnesses is telling the truth.' [Citation.] The defense of a reasonable belief in consent by contrast, 'permits the jury to conclude that both the victim and the accused are telling the truth. The jury will first consider the victim's state of mind and decide whether she consented to the alleged acts. If she did not consent, the jury will view the events from the defendant's perspective to determine whether the manner in which the victim expressed her lack of consent was so equivocal as to cause the accused to assume that she consented where in fact she did not.'

[Citations.] The foundation, therefore, for the reasonable belief in consent defense is evidence from which the jury could conclude the defendant acted under a *mistake of fact* that created a reasonable belief the victim consented to the charged acts." (People v. Rhoades (1987) 193 Cal.App.3d 1362, 1367, emphasis in original.)

The evidence relied on by defendant does not suggest he acted under a mistake of fact regarding Ronda's consent. The gist of Carter's testimony was that Ronda told him she would do him some sexual favors if he would buy her some cocaine. The gist of Johnson's testimony was that Ronda approached Johnson for the purpose of having sex with her but she refused. This evidence suggests that Ronda consented, not that defendant erroneously believed she consented due to a mistake of fact. "[U]nless the evidence reveals *some way* to harmonize the conflicting accounts of defendant and prosecutrix through a mistake of fact, so that the jury can evaluate proof relating to defendant's *belief* in consent (as distinguished from his mere *assertion* of consent), the court need not give the reasonable belief instruction sua sponte." (*Rhoades, supra,* 193 Cal.App.3d at pp. 1369-1370, emphasis in original.) Here, there was no substantial evidence of a mistake of fact giving rise to a belief of consent. Therefore, the trial court did not err in failing to instruct sua sponte with CALJIC No. 10.65.

VII

Defendant contends three of the oral copulation counts (counts V, VI, VII) must be reversed because the trial court failed to instruct the jury with CALJIC No.

17.01 that they were required to agree unanimously as to the acts upon which liability was based. Defendant asserts the court was required to give the unanimity instruction because there was evidence of three acts of oral copulation with Johnson and four acts of oral copulation with defendant but only four counts were charged, two with Johnson and two with defendant.

"A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. This danger, however, does not automatically arise in every case where a confused and distraught victim happens to recall additional instances of the sex crime charged. Rather, the possibility of disagreement exists where the defendant is accused of a number of unrelated incidents, such as alleged rapes at different times or places, leaving the jurors free to believe different parts of the testimony and yet convict the defendant. Disagreement may also exist where the defendant offers a defense which could be accepted or rejected as to some but not all of the acts. In this situation, the jurors again may disagree as to which act the defendant was guilty of and yet convict him. [¶] If under the evidence presented such disagreement is not reasonably possible, the instruction is unnecessary." (People v. Gonzalez (1983) 141 Cal.App.3d 786, 791-792, citations omitted; disapproved on other grounds in People v. Kurtzman (1988) 46 Cal.3d 322, 330.)

Defendant was charged with two violations of section 288a, subdivision (d), which involved forcing Ronda to orally copulate Johnson. Ronda testified that Carter forced her to orally copulate Johnson in one room and then made her to do it again in another room. When she

was asked how many times she was forced to put her mouth on Johnson's vagina, Ronda replied it happened two or three times. No evidence was introduced concerning the details of this alleged third act of oral copulation.

Although the jury may have rejected the evidence of the third act, it is inconceivable that any of the jurors found defendant liable for the third act of oral copulation while rejecting evidence of defendant's liability for the other two acts for which the evidence was more thorough. If the jury believed defendant was liable for any acts of oral copulation, at a minimum it must have found him liable for the two acts about which Ronda testified most specifically. Under the circumstances, there was no reasonable possibility of disagreement among the jurors and the unanimity instruction was unnecessary. (People v. Schultz (1987) 192 Cal.App.3d 535, 540.)

Regarding the acts of oral copulation upon Carter, the evidence disclosed Carter made Ronda do it the first time after she took out her tampon. He forced her to orally copulate him again after she had done so to Johnson. A third act occurred while Johnson fondled Carter's testicles. A fourth act occurred when Carter made Ronda suck his scrotum. (See People v. Catelli (1991) 227 Cal.App.3d 1434, 1448-1451.)

There is nothing in the record by way of evidence or argument by which different members of the jury could reach differing conclusions about which two of the four acts Carter committed. All four acts took place at Johnson's apartment over a period of approximately one and one-half to two hours. Carter's sole defense was that Ronda agreed to perform sexual acts in exchange for

cocaine and that she orally copulated him voluntarily. There was no evidence presented that tended to discredit Ronda's testimony about any particular act. In other words, the jury was presented with a credibility contest between Ronda and Carter: either all of the acts were consensual or all four acts were performed by Ronda against her will. (*Gonzalez, supra,* 141 Cal.App.3d at p. 792.) Since it is not reasonably possible that the jurors disagreed about which acts Carter committed, the court did not commit prejudicial error in failing to give CALJIC No. 17.01.

VIII

Section 654 provides: "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one. . . . "

Defendant asserts the court should have stayed his sentence on the kidnapping count pursuant to section 654 because he kidnapped Ronda for the sole purpose of committing the sexual offenses against her for which he was also punished. (See People v. Flores (1987) 193 Cal.App.3d 915, 922; People v. Galvan (1986) 187 Cal.App.3d 1205, 1219; People v. Masten (1982) 137 Cal.App.3d 579, 589, disapproved on other grounds in People v. Jones (1988) 46 Cal.3d 585, 600, fn. 8.)

The People respond that, because the court sentenced defendant pursuant to section 667.6, subdivision (c), section 654 has no application. (People v. Andrus (1990) 226 Cal.App.3d 73, 78-79; but see *Galvan, supra,* 187

Cal.App.3d at p. 1217; *Masten, supra*, 137 Cal.App.3d at p. 589.) Section 667.6, subdivision (c) permits the trial court, in its discretion, to sentence a defendant to full, consecutive terms for specified violent offenses "whether or not the crimes were committed during a single transaction."

We need not address whether the People's contention is correct because there is evidence that defendant did not kidnap Ronda solely to commit forcible rape and oral copulation.

"[I]t is well settled that section 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. Whether a course of conduct is indivisible depends upon the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (People v. Perez (1979) 23 Cal.3d 545, 551, citations omitted.) But where the defendant "entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were part of an otherwise indivisible course of conduct." (People v. Beamon (1973) 8 Cal.3d 625, 639.)

Ronda testified that, on the way to San Francisco, defendant and Carter had a conversation about how they were going to make money by selling something. When they arrived in San Francisco, they drove to an area where there were a lot of topless bars. They parked the

car, got out and approached a group of five men. Carter told Ronda she was going to be auctioned off to the men. She heard the men discuss something about setting her up in a room, and one man offered to buy her for $500. At that point, Ronda assumed that selling her was the means of making money defendant and Carter were discussing during the drive to San Francisco.

The trial court properly could conclude from this evidence that defendant had multiple objectives in kidnapping Ronda. He abducted her to sell her into prostitution as well as to achieve his own sexual gratification via the forcible sexual offenses of which he was convicted. "Since it appears that in committing the kidnaping [defendant] had criminal objectives (of which he was not convicted) apart and/or in addition to the rape and oral copulation . . . , punishment for kidnaping as well as rape and oral copulation does not violate the prohibition against multiple punishment contained in Penal Code section 654." (People v. Ratcliffe (1981) 124 Cal.App.3d 808, 819.)

IX

Citing section 654, defendant contends the trial court erroneously imposed consecutive terms on counts V through VIII because his convictions on those counts were based on his acts of aiding and abetting and he "did not aid and abet . . . over and over, but only once." He claims "[i]t is possible to punish Carter for each of counts [V] through [VIII] because he committed a separate act to support each charge. [Citation.] But [defendant] only committed some earlier single act which gave rise to

criminal liability through a vicarious liability theory. [Defendant] may be punished for that single act, but only once." Defendant misapprehends the nature of aider and abettor liability.

Defendant's punishment on counts V through VIII is not based upon his own acts of aiding and abetting Carter, which acts he concededly performed only once, but upon Carter's various criminal acts which defendant aided and abetted. An aider and abettor's liability to punishment "is vicarious. Like the conspirator whose liability is predicated on acts other than and short of those constituting the elements of the charged offense, if the acts are undertaken with the intent that the actual perpetrator's purpose be facilitated thereby, he is a principal and liable for the commission of the offense. Also like a conspirator, he is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets." (People v. Croy (1985) 41 Cal.3d 1, 12, fn. 5; *Price, supra,* 1 Cal.4th at p. 442.)

Contrary to defendant's contention, he is not being "punished five times for a single act – the act of kidnapping." (AOB 43) Rather, he is being punished once for the kidnapping and once for each of Carter's sex offenses which were natural and probable consequences of the kidnapping.[2]

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[2] Our holding is fatal to defendant's separate contention that the trial court erred in imposing weapon enhancements on counts II and V through VIII because those offenses arose from defendant's singular act of aiding and abetting. However, the weapons enhancements must be stricken for reasons discussed in parts X and XI of this opinion (*post*).

X

Defendant argues his section 12022.3, subdivision (a) enhancements[3] on counts II through VII must be stricken because the statute requires personal use of a deadly weapon and the jury found that, while a knife was used during the commission of those offenses, defendant did not personally use the knife. We agree.[4]

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[3] Section 12022.3 provides in pertinent part: "For each violation of Section . . . 264.1 [and] 288a . . . , and in addition to the sentence provided, any person shall receive the following: [¶] (a) A three-, four-, or five-year enhancement if the person uses a firearm or any other deadly weapon in the commission of the violation. [¶] (b) A one-, two-, or three-year enhancement if the person is armed with a firearm or any other deadly weapon."

[4] On counts II through VIII, the original information alleged that Carter personally used a deadly and dangerous weapon, a knife, within the meaning of section 12022.3, subdivision (a), and that defendant was armed with a deadly weapon, a knife, within the meaning of section 12022.3, subdivision (b). The amended information filed shortly before trial alleged in its original form that each defendant "personally used" a deadly and dangerous weapon within the meaning of section 12022.3, subdivision (a). However, before the information was filed, the prosecutor struck out the word "personally" from the allegations regarding defendant.

The jury was instructed with a modified version of CALJIC No. 17.19.1 containing the following paragraph which is not a part of the pattern instruction: "A person who is a principal in the commission of a crime is deemed to have 'used a deadly weapon' if one or more principals in such a crime is found to have personally used a deadly weapon, whether or not such person personally used a deadly weapon."

Anticipating this instruction, the prosecutor urged the jury to find that the weapon uses were personal as to Carter and were not personal as to defendant. The jury found defendant used a knife in the commission of counts II through VII, but expressly found that his use was not personal.

In People v. Reed, supra, 135 Cal.App.3d 149, this court held that section 12022.3, subdivision (b), which enhances the penalty for one who is *armed* with a firearm or other deadly weapon in the commission of an offense, applies only to one who is *personally* armed with a firearm or other deadly weapon. *Reed* noted that section 12022.3 was ambiguous compared to other enhancement statutes. (*Id.*, at p. 152.) To determine the Legislature's intent, the court applied the rule of People v. Walker (1976) 18 Cal.3d 232 that "if a statute is intended to impose derivative liability on some person other than the actor, there must be some legislative direction that it is to be applied to persons who do not themselves commit the proscribed act." (*Id.*, at pp. 241-242; *Reed, supra*, at p. 153.) Finding no such direction, *Reed* concluded: "Since section 12022.3, subdivision (b), unlike other enhancement provisions, does not include such express legislative direction, it is reasonably susceptible to a construction which permits additional punishment only when the defendant *is personally armed* with a firearm or other deadly weapon." (*Id.*, at p. 153, emphasis added.)[5]

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[5] On page 63 of the opening brief, defendant's appellate counsel misquotes *Reed* and, based upon his incorrect reading of the case, suggests the case "unfortunately introduced some confusion into the holding and into subsequent cases because of mixup in terms, which was probably inadvertent." However, it is appellate counsel who has added confusion by erroneously quoting *Reed* as stating, "Since section 12022.3, subdivision (b), unlike other enhancement provisions, does not include such express legislative direction, it is reasonably susceptible to a construction which permits additional punishment only when the defendant *personally uses* a firearm." (Emphasis in defendant's brief.)

The wording of the use enhancement of section 12022.3, subdivision (a), is virtually identical to the language of the armed enhancement of section 12022.3, subdivision (b). (See fn. 3, *ante*.) Thus, *Reed's* construction necessarily governs subdivision (a), and the use enhancement is limited to a defendant who *personally uses* a firearm or other dangerous weapon in the commission of the offense.

The People ask us to reconsider the reasoning of *Reed* in light of the Fourth Appellate District's decision in People v. Le (1984) 154 Cal.App.3d 1, 11-12, which disagreed with the *Reed* analysis. We decline the invitation. *Le* is unpersuasive and was criticized by the California Supreme Court in 1986. (People v. Piper (1986) 42 Cal.3d 471, 477, fn. 5; see People v. Ramirez (1987) 189 Cal.App.3d 603, 626-627.)

Section 12022.3 has been amended twice since *Reed* was decided and was cited with approval by the California Supreme Court. (Stats. 1989, ch. 1167, § 3; Stats. 1991, ch. 512, § 1.) The Legislature's failure to use those opportunities to insert a provision imposing derivative liability is indicative of an intent to leave the law as interpreted by *Reed*. (Cumero v. Public Employment Relations Bd. (1989) 49 Cal.3d 575, 596; Estate of McDill (1975) 14 Cal.3d 831, 837-838.)

Because the jury found that defendant did not personally use a deadly weapon in the commission of counts

II through VIII, the section 12022.3, subdivision (a), enhancement must be stricken.[6]

XI

Defendant contends that *Reed* also is fatal to his section 12022.3, subdivision (b), armed enhancement on count VIII. Again, we agree. The evidence showed that only a single knife was involved. No evidence suggested that defendant possessed it during count VIII which was committed by Carter while defendant was asleep. On this count, the jury found that defendant did not use a knife, that said "use" was not personal, but that defendant was armed during the commission of the offense. These findings suggest that the jury's "armed" finding was based on personal arming by Carter, not defendant.

Because the evidence did not establish that defendant personally was armed in the commission of count VIII, the section 12022.3, subdivision (b), enhancement must be stricken. (*Reed, supra,* 135 Cal.App.3d at p. 153.)[7]

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[6] In light of this holding, we need not address defendant's claim that the evidence does not support the jury's finding that a knife was used in the commission of count IV. Nor do we need to respond to defendant's contention that the trial court erroneously imposed knife use enhancements on counts II through VII because only one weapon enhancement is permissible where the court sentences under section 667.6.

[7] In light of this holding, we need not address defendant's claim that the evidence does not support the jury's finding that Carter was armed with a knife in the commission of count VIII.

DISPOSITION

The section 12022.3 weapons enhancements on counts II through VIII are stricken. In all other respects, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment to reflect the striking of the weapons enhancements and shall forward a certified copy of the amended abstract to the Department of Corrections.

/s/ SCOTLAND, J.

We concur:

/s/ PUGLIA, P.J.

/s/ BLEASE, J.

APPENDIX B

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. FLETCHER RAY SIMS, Defendant and Appellant.	)	C012631 (Super. Ct. No. CR104600) (Filed Jan. 7, 1993) ORDER MODIFYING OPINION [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on December 23, 1992, be modified in the following respect:

Delete footnote 5 on page 31. This modification will require renumbering of the footnotes.

This modification does not affect the judgment.

THE COURT:

PUGLIA, P.J.
BLEASE, J.
SCOTLAND, J.

APPENDIX C

Third Appellate District No. C012631
S031034

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

(Filed Mar. 24, 1993)

THE PEOPLE, Respondent

v.

FLETCHER RAY SIMS, Appellant

Appellant's petition for review DENIED.

LUCAS
Chief Justice